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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
08/813,852	03/07/1997	RODNEY L. DOCKERY	21651.3	3963

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EXAMINER

FISCHER, ANDREW J

ART UNIT	PAPER NUMBER
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3627

DATE MAILED: 04/13/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

08/813,852

Applicant(s)

DOCKERY ET AL.

Examiner

Andrew J. Fischer

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,4,10,17-23 and 25-28 is/are pending in the application.
- 4a) Of the above claim(s) 1,4,10,17 and 26-28 is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 18-23 and 25 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. ____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date <u>5/26/04</u> . | 6) <input type="checkbox"/> Other: ____. |

DETAILED ACTION***Acknowledgements***

1. The USPTO's Board of Patent Appeals and Inferences ("Board") remanded this application to the examiner in the Remand to the Examiner ("Remand").¹ After further consideration of the entire record, the Examiner has set forth rejections in this non final Office Action.
2. The examiner for this application has changed. Please indicate Examiner Andrew J. Fischer as the examiner of record in all future correspondences.
3. Claims 18-23 and 25 remain pending in this application.
4. Claims 1, 4, 10, 17, and 26-28 stand withdrawn from consideration as be directed to non-elected claims.
5. Unless expressly noted otherwise, all references in this Office Action to the capitalized versions of "Appellants," or "Applicants" refers specifically the Applicants of record. References to lower case versions of "applicant," "applicants," or "appellants" refers to any or all patent "applicants." Unless expressly noted otherwise, references to the capitalized versions of "Examiner" in this Office Action refers to the Examiner of record while reference to or use of lower case versions of "examiner" or "examiners" refers to examiner(s) generally.
6. This Office Action is written in OACS. Because of this, the Examiner is unable to control formatting, paragraph numbering, font, spelling, line spacing, and/or other word processing issues. The Examiner sincerely apologies for these errors.

Claim Rejections - 35 USC §102

7. The following is a quotation of the appropriate paragraphs of 35 U.S.C. §102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States. . . .

(c) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

8. Claims 18, 19, and 25 are rejected under 35 U.S.C. §102(b) as being anticipated by the telephone book The One Book for Northern Virginia for 1993 (“One Book”). It is the Examiner’s factual determination that the One Book is a periodical. The Examiner takes Official Notice that phone books are published on a early basis (*i.e.* they come out once a year). Thus, the One Book is a periodical. It is the Examiner’s factual determination that One Book is a periodical that contains articles. In this case, the Examiner finds that because One Book directly discloses a coupon section, a “recycling information” section, the “Yellow Pages and Business White Pages” section, One Book is comprised of articles when using the definitions now of record, *supra*. Because One Books is thus a periodical comprised of articles, it is the Examiner’s factual determination that One Book is a magazine. In this case, it is the Examiner’s factual determination that the advertisements for pet supplied (*e.g.* Federal Lock and Safe,”

¹ See “Remand to the Examiner,” mailed July 23, 2004, Paper No. 54.

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"Marinelife," "Creatures 'n Critters" are articles. The articles reference brand name products, *e.g.* "Iams" pet food.

9. The Examiner finds that the magazine is specific to a particular store (*e.g.* a pet store).

Claim Rejections - 35 USC §103

10. The following is a quotation of 35 U.S.C. §103(a) which forms the basis for all obviousness rejections set forth in this Office Action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

11. Claims 18, 19, and 25 are alternatively rejected under 35 U.S.C. §103(a) as being unpatentable over The One Book.² It is the Examiner's principle position that the claims are anticipated because of the inerencies the One Book contains articles.

However if not inherent, it would have been obvious to a person having ordinary skill in the art at the time the invention was made to modify the One Book to include general interest articles.

12. Claims 18, 20-23 are rejected under 35 U.S.C. §103(a) as being unpatentable over Hawaiian Airlines³ in view of The One Book. Hawaiian Airlines discloses a plurality of general interest articles dispersed throughout a magazine (see *e.g.* "Front Desk", page 15, last column, last full paragraph stating that "Hawaiian Airlines offers a deluxe 'Paradise

² See MPEP §2112 expressly authorizing alternative §102/§103 rejections when the question of inherency is present in the anticipation rejection.

³ From the Information Disclosure Statement ("IDS") filed June 9, 2004 (Paper No. 53).

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Resorts' package that includes lei greeting and two nights at the Hyatt"); an advertisement (after page 38) directed to Hawaiian Airlines and referencing flights to and from Hawaii; the specific brand (Hawaiian Airlines) is authored under commission by a sponsor of the specific brand in said article (not only is the article under commission—the entire magazine is under commission of Hawaiian Airlines); the specific store appears on the front cover (Hawaiian Airlines appears on the cover of the magazine); and airline tickets are controlled at least in part by Hawaiian Airlines.

Hawaiian Airlines ad (after page 38) does not directly disclose a coupon. However One teaches the use of brand specific coupons. Therefore it would have been obvious to a person having ordinary skill in the art at the time the invention was made to modify Hawaiian Airlines advertisement (found on the page directly after page 38) to include the brand specific coupons as found in the One Book. By limited the airline tickets to Hawaiian Airlines only (and not any airline), Hawaiian Airlines ensures that the advertisements are brand specific. Such a modification would have provided Hawaiian Airlines a method of ensuring that its flight customers take home with them their complimentary copy of Hawaiian Airlines so that they could use the coupon in their next purchased flight.

13. The One Book directly discloses a coupons keyed to articles containing brand specific information (see e.g. "Marinelife", "Creatures 'n Critters" and P.T. Moran Company Pet Food Supplies" which disclose "Science Diet," "Iams," and "Nulro Max" "brand name pet foods"). Therefore it would have been obvious to a person having ordinary skill in the art at the time the invention was made modify the Royal Lahaina Luau advertisement to include a coupon for a "Hawaiian pig" or other brand name feature

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at the luau. Such a modification would have allowed the browsers of Hawaiian Airlines to associate a brand they are familiar with to the luau.

14. After careful review of the specification and prosecution history, the Examiner is unaware of any desire—either expressly or implicitly—by Applicants to be their own lexicographer and to define a claim term to have a meaning other than its ordinary and accustomed meaning. Therefore, the Examiner starts with the heavy presumption that all claim limitations are given their ordinary and accustomed meaning. See *Bell Atlantic Network Services Inc. v. Covad Communications Group Inc.*, 262 F.3d 1258, 1268, 59 USPQ2d 1865, 1870 (Fed. Cir. 2001) (“[T]here is a heavy presumption in favor of the ordinary meaning of claim language as understood by one of ordinary skill in the art.”); *CCS Fitness Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366, 62 USPQ2d 1658, 1662 (Fed. Cir. 2002) (There is a “heavy presumption that a claim term carries its ordinary and customary meaning.”). See also MPEP §2111.01 and *In re Zletz*, 893 F.2d 319, 321, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989).⁴

In accordance with the ordinary and accustomed meaning presumption, during examination the claims are interpreted with their “broadest reasonable interpretation” *In re Morris*, 127 F.3d 1048, 1054, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997). See also MPEP §2111. In fact, this their ‘broadest reasonable interpretation’ standard is not optional since the Examiner is required to use this interpretation.⁵

⁴ It is the Examiner’s position that “plain meaning” and “ordinary and accustomed meaning” are synonymous. See e.g. *Rexnord Corp. v. Laitram Corp.*, 274 F.3d 1336, 1342, 60 USPQ2d 1851, 1854 (Fed. Cir. 2001) (“[A]ll terms in a patent claim are to be given their plain, ordinary and accustomed meaning . . .”).

⁵ “However, the Board is *required* to use a different standard for construing claims than that used by district courts. We have held that it is *error for the Board to apply the mode*

However, if Applicants disagree with the Examiner and have either (a) already used lexicography or (b) wish to use lexicography and therefore (under either (a) or (b)) desire a claim limitation to have a meaning other than its ordinary and accustomed meaning, the Examiner respectfully requests Applicants in their next properly filed response to expressly indicate⁶ the claim limitation at issue and to show where in the specification or prosecution history the limitation is defined. Such definitions must be clearly stated in the specification or file history. *Bell Atlantic*, 262 F.3d at 1268, 59 USPQ2d at 1870, (“[I]n redefining the meaning of particular claim terms away from the ordinary meaning, the intrinsic evidence must ‘clearly set forth’ or ‘clearly redefine’ a claim term so as to put one reasonably skilled in the art on notice that the patentee intended to so redefine the claim term”).⁷ The Examiner cautions that no new matter is allowed.

of claim interpretation that is used by courts in litigation, when interpreting the claims of issued patents in connection with determinations of infringement and validity. Instead, as we explained above, the PTO is obligated to give claims their broadest reasonable interpretation during examination. [Emphasis added.]” *In re American Academy of Science Tech Center*, 367 F.3d 1359, 1369, 70 USPQ2d 1827, 1834 (Fed. Cir. 2004).

⁶ “Absent an *express intent* to impart a novel meaning, terms in a claim are to be given their ordinary and accustomed meaning. [Emphasis added.]” *Wenger Manufacturing Inc. v. Coating Mach. Sys., Inc.*, 239 F.3d 1225, 1232, 57 USPQ2d 1679, 1684 (Fed. Cir. 2001) (citations and quotations omitted). “In the absence of an *express intent* to impart a novel meaning to claim terms, an inventor’s claim terms take on their ordinary meaning. We indulge a heavy presumption that a claim term carries its ordinary and customary meaning. [Emphasis added.]” *Teleflex Inc. v. Ficosa North America Corp.*, 299 F.3d 1313, 1325, 63 USPQ2d 1374, 1380 (Fed. Cir. 2002) (citations and quotations omitted).

⁷ See also *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582, 39 USPQ2d 1573, 1576 (Fed. Cir. 1996), (“[A] patentee may choose to be his own lexicographer and use terms in a manner other than their ordinary meaning, *as long as* the special definition of the term is *clearly stated* in the patent specification or file history. [Emphasis added.]”); *Multiform Desiccants Inc. v. Medzam Ltd.*, 133 F.3d 1473, 1477, 45 USPQ2d 1429, 1432 (Fed. Cir. 1998) (“Such special meaning, however, must be sufficiently clear in the

Applicants are reminded that failure by Applicants in their next properly filed response to properly traverse this issue in accordance with 37 C.F.R. §1.111(b) or to be non-responsive to this issue entirely will be considered a desire by Applicants to forgo lexicography in this application and to continue having the claims interpreted with their broadest reasonable interpretation.⁸ Additionally, it is the Examiner's position that the above requirements are reasonable.⁹ Unless expressly noted otherwise by the Examiner, the preceding discussion on claim interpretation principles applies to all examined claims currently pending.

15. To the extent that the Examiner's interpretations are in dispute with Applicants' interpretations, the Examiner hereby adopts the following definitions—under the broadest reasonable interpretation standard—in all his claim interpretations.¹⁰ The list is provided

specification that any departure from common usage would be so understood by a person of experience in the field of the invention.”). See also MPEP §2111.01, subsection titled “Applicant May Be Own Lexicographer” and MPEP §2173.05(a) titled “New Terminology.”

⁸ See 37 C.F.R. §1.104(c)(3) which states in part: “the examiner may rely upon admissions by applicant . . . as to *any matter* affecting patentability [Emphasis added.]”

⁹ The Examiner's requirements on this matter are reasonable on at least two separate and independent grounds. First, the Examiner's requirements are simply an express request for clarification of how Applicants intend their claims to be interpreted so that lexicography (or even an *attempt* at lexicography) by Applicants is not inadvertently overlooked by the Examiner. Second, the requirements are reasonable in view of the USPTO's goals of compact prosecution, productivity with particular emphasis on reductions in both pendency and cycle time, and other goals as outlined in the USPTO's The 21st Century Strategic Plan, February 3, 2003 available at www.uspto.gov/web/offices/com/strat21/index.htm (last accessed April 3, 2005).

¹⁰ While most definitions are cited because these terms are found in the claims, the Examiner may have provided additional definition(s) to help interpret words, phrases, or concepts found in the definitions themselves or in the prior art.

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simply as a factual source to support the Examiner's claim interpretations (and ultimately the Board of Patent Appeals and Interferences claim interpretations if necessary¹¹) during ex parte examination. Moreover, while the following list is provided in accordance with *In re Morris*, the definitions are a guide to claim terminology since claim terms must be interpreted in context of the surrounding claim language.¹² Finally, the following list is not intended to be exhaustive in any way:

- a. ***Magazine*** "4 a : a periodical containing miscellaneous pieces (as articles, stories, poems) often illustrated. Merriam-Webster's Collegiate Dictionary, 9th Edition, Merriam-Webster Inc., Springfield, M.A., 1986.
- b. ***Periodical*** "2 a: publish with a fixed interval between the issues or numbers." Id.
- c. ***Article*** "1 a : a distinct often number section of a writing" Id.

16. It is the Examiner factual determination that the term "magazine is not a technical term. Thus, a non-technical dictionary is appropriate for determining its ordinary and accustomed meaning.

17. The Examiner finds that is old and well known in the art to key coupons for brand name products to other articles. It is the Examiner's factual determination that the One

¹¹ See *Gechter v. Davidson*, 116 F.3d 1454, 1460, 43 USPQ2d 1030, 1035 (Fed. Cir. 1997) ("[W]e hold that the Board is required to set forth in its opinions specific findings of fact and conclusions of law adequate to form a basis for our review.").

¹² See e.g. *Brookhill-Wilk 1 LLC v. Intuitive Surgical Inc.*, 334 F.3d 1294, 1300, 67 USPQ2d 1132, 1137 (Fed. Cir. 2003) (abstract dictionary definitions are not alone determinative; "resort must always be made to the surrounding text of the claims in question").

Book is a periodical. The Examiner takes Official Notice that phone books come out at least one a year. Thus, the One Book is a periodical.

Response to Arguments

18. Applicants' arguments filed in their Appeal Brief and Reply Brief have been fully considered but they are not persuasive.

19. As a matter of law, the Declarations of recorded can not overcome the §102(b) rejections made. With respect to the §102(b) rejections, the declarations are not persuasive.

20. In the event the Board can not sustain the §102(b) rejections, the Examiner has considered the declaration of Caleib J. Pirtle filed March 28, 2002 ("Pirtle Declaration"). The Examiner finds that the declaration does not provide the proper nexus linking the general interest articles to the promotional successes stated in the declaration.

21. The Examiner has carefully reviewed "Sally" as referenced in the Pirtle Declaration. The Examiner finds that the "general interest articles" are not distinguished from advertisements. The Examiner finds that "Sally" is an advertisement from "Sally Beauty Supply, "your one-stopping destination for all your beauty needs."¹³ The Examiner finds that "Sally" does not contain referencing indicia separating general interest stories from advertisements as found in other magazines of record. See page 3 of *e.g.* Hawaiian Airlines which uses the word "ADVERTISEMENT" to separate an advertisement from a general interest story in the magazine. Because there is no distinction between article and advertisement in "Sally," the Examiner finds that the

“general interest articles” in “Sally” are advertisements just as the articles in the One Book are advertisements. However a 35 U.S.C. §112 2nd paragraph rejection is not present because under the mandated broadest reasonable interpretation, advertisements may be articles and articles may be advertisements.

22. Additionally, the Examiner notes that the Pirtle Declaration in paragraph no. 8 expressly states that “Dockery House was successful in obtaining approximately 5% of the nearly \$100million promotional magazine market by October 2001.” The Pirtle Declaration however fails to state the context of this 5% share. While the Pirtle Declaration states that this 5% is a “relatively large amount of a mature and well established market,” the Pirtle Declaration fails to show how their 5% share fits within this market. For example, the 5% share could be a milestone, not achieved by any other marketing program. On the other hand, this 5% share could be one of a possible twenty (20) interests that make up the market. In the case of the later, a 5% share would not be remarkable. It is therefore impossible to conclude the context of the 5% share.

23. Furthermore, the Pirtle Declaration asserts that the success of the sale promotional magazine is evident from the feedback received. The Pirtle Declaration cites the attached letter from Judy Cole, Vice President of Advertising/Public relations (“Cole Letter”). The Examiner has fully reviewed and considered the Cole Letter. In particular, the Cole Letter states that in reference to the coupon redemption rate, “Sally” corporation “in some instances it has reached as high as 10% when a general interest article incorporates a product and includes a coupon.” First, the Examiner notes that the Cole Letter fails to mention that the coupon be a brand name coupon. Second, the Cole Letter fails to

¹³ *Sally* Vol 1, No. 2, 224002, Page 2.

mention the coupon redemption rate in promotional material that do not use the claimed invention. Thus, the nexus is not present. In other words, it is impossible to but the 10% redemption rate in context. The Examiner concludes that the declaration fails to provide factual corroboration.

24. The Examiner as factfinder has broad discretion as to the weight to give to declarations offered in the course of prosecution. Because of the deficiencies noted above in the Cole Letter and because Pirtle Declaration has not offered any other evidence to support the statements therein, the Examiner finds that the lack of factual corroboration warrants discounting the opinions expressed in the declaration. *In re American Academy of Science Tech Center*, 367 F.3d 1359, 1368, 70 USPQ2d 1827, 1833 (Fed. Cir. 2004) (citations and quotation omitted).

Conclusion

25. References considered pertinent to Applicants' disclosure are listed on form PTO-892. Unless expressly noted otherwise by the Examiner, all references listed on form PTO-892 are cited in their entirety.

26. The following two (2) citations to the Manual of Patent Examining Procedure ("MPEP") apply to this Office Action: MPEP citations to Chapters 100, 200, 500, 600, 700, 1000, 1100, 1300, 1400, 1500, 1700, 1800, 2000, 2100, 2200, 2500, 2600, and 2700 are from the MPEP 8th Edition, Rev. 2, May 2004. All remaining MPEP citations are from MPEP 8th Edition, August 2001.

27. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for

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published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

28. In accordance with the USPTO's goals of customer service, compact prosecution, and reduction of cycle time, the Examiner has made every effort to clarify his position regarding claim interpretation and any rejections or objections in this application.

Furthermore, the Examiner has again provided Applicants with notice—for due process purposes—of his position regarding his factual determinations and legal conclusions.

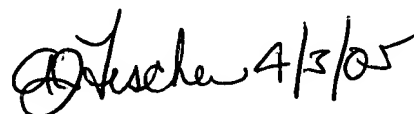
The Examiner notes and thanks Applicants for their "Arguments" in their Appeal Brief traversing the Examiner's positions on various points. If Applicants disagree with any additional factual determination or legal conclusion made by the Examiner in this Office Action whether expressly stated or implied,¹⁴ the Examiner respectfully reminds

Applicants to properly traverse the Examiner's position(s) in accordance with 37 C.F.R. §1.111(b) in their next properly filed response. By addressing these issues now, matters where the Examiner and Applicants agree can be eliminated allowing the Examiner and Applicants to focus on areas of disagreement (if any) with the goal towards allowance in the shortest possible time. If Applicants have any questions regarding the Examiner's positions or have other questions regarding this communication or even previous communications, Applicants are strongly encouraged to contact Examiner Andrew J.

¹⁴ *E.g.*, if the Examiner rejected a claim under §103 with two references, although not directly stated, it is the Examiner's implied position that the references are analogous art.

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Fischer whose telephone number is (703) 305-0292. If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's immediate supervisor, Robert Olszewski, can be reached at (703) 308-5183. The fax number for facsimile responses is now (703) 872-9306.



Andrew J. Fischer
Primary Examiner
Art Unit 3627

AJF
April 3, 2005